PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

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TO: PARTIES OF RECORD IN CASE 05-12-004

This is the draft decision of Administrative Law Judge (ALJ) Walker. It will not appear on the Commission's agenda for at least 30 days after the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure," accessible on the Commission's website at http://www.cpuc.ca.gov. Pursuant to Rule 77.3 opening comments shall not exceed 15 pages.

Comments must be filed with the Commission's Docket Office. Comments should be served on parties to this proceeding in accordance with Rules 2.3 and 2.3.1. Electronic copies of comments should be sent to ALJ Walker at gew@cpuc.ca.gov. All parties must serve hard copies on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail or other expeditious methods of service. The current service list for this proceeding is available on the Commission's website, www.cpuc.ca.gov.

/s/ Angela K. Minkin
Angela K. Minkin, Chief
Administrative Law Judge

ANG:avs

Attachment

Decision **DRAFT DECISION OF ALJ WALKER (Mailed 6/13/2006)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Chevron Products Company, Complainant, vs. Equilon Enterprises LLC, dba Shell Oil Products US, and Shell Trading (US) Company, Defendants.	Case 05-12-004 (Filed December 5, 2005)

OPINION GRANTING MOTION TO DISMISS

1. Summary

Complainant alleges that an oil pipeline operated by defendants and running from the San Joaquin Valley production fields to Bay Area refineries is a public utility subject to regulation by this Commission. Defendants move to dismiss the complaint, arguing that the moving parties are entitled to judgment as a matter of law based on the doctrines of *res judicata* and judicial estoppel as well as a long-standing practice of this Commission with respect to proprietary oil pipelines. For the reasons set forth below, we grant the motion of defendants and dismiss the complaint. To the extent that complainant seeks a change in the Commission's practice as to proprietary oil pipelines, complainant may consider a petition for rulemaking pursuant to Pub. Util. Code § 1708.5 so that other parties affected by the proposed change could take part in the proceeding. This case is closed.

2. Procedural Background

This proceeding concerns the 265-mile-long 20-inch heated oil pipeline running from the San Joaquin Valley to the Bay Area (the 20" Pipeline). On December 5, 2005, Chevron Products Company (Chevron) filed this complaint against the owners of the 20" Pipeline, Equilon Enterprises LLC, doing business as Shell Oil Products US (Equilon) and Shell Trading (US) Company (Shell Trading). The complaint accuses Equilon and Shell Trading of operating the 20" Pipeline as a public utility and argues that the pipeline should be subject to Commission rate regulation. Tesoro Refining and Marketing Company (Tesoro) intervened seeking the same relief and raising the same allegations.

A prehearing conference was conducted on March 21, 2006, at which time the Administrative Law Judge (ALJ) proposed bifurcating the proceeding into two parts: first, determining whether the 20" Pipeline is or is not a public utility; second, if the pipeline is deemed a public utility, conducting an appropriate ratesetting proceeding. A Scoping Memo memorializing this procedure was issued by the Assigned Commissioner on March 28, 2006.

On March 30, 2006, Equilon and Shell Trading filed a Motion to Temporarily Stay Discovery Pending Dispositive Motion and Request for Expedited Treatment. The motion was granted by the ALJ based on defendants' representation that a motion to dismiss, to be filed no later than April 6, 2006, could resolve the complaint. The motion to dismiss was filed on April 5, 2006, and responses to the motion were filed on April 25, 2006. Chevron on April 20, 2006, filed a motion for summary adjudication on its behalf, and the defendants responded to that motion on May 5, 2006. The ALJ granted requests by the moving parties to file replies as to the motion to dismiss and the motion for summary adjudication.

3. Factual Dispute

Chevron has used the 20" Pipeline for approximately 10 years through buy/sell agreements with Equilon pursuant to a California Proprietary Pipeline Transportation Commitment Agreement (the Proprietary Pipeline Contract), dated as of December 12, 2001, between Texaco Inc. (predecessor in interest to Chevron) and Equilon. A buy/sell agreement is a contract in which a pipeline owner buys crude oil from a supplier at one end of the pipeline and sells an equivalent amount of oil to the supplier at the other end of the pipeline.

In 2005, prior to filing its complaint with this Commission, Chevron disputed the prices of certain buy/sell agreements with Shell Trading and Equilon. In accordance with the terms and conditions of the Proprietary Pipeline Contract, the dispute was submitted to arbitration. An arbitration decision was issued on June 20, 2005, establishing the price per barrel under the buy/sell agreements through December 31, 2005.

According to defendants, Chevron for a time refused to honor the arbitration award and refused to arbitrate pricing after calendar year 2005. Nevertheless, in December 2005, Chevron and Shell Trading entered into a new buy/sell agreement establishing pricing for transactions between January 1, 2006 and June 30, 2007. Chevron at that time also filed this complaint with the Commission. Chevron contends that if the Commission determines that the 20" Pipeline is operated as a public utility, then the Commission will assume exclusive jurisdiction to regulate rates and charges, and the arbitrator's award

and the new buy/sell agreement for 2006 and 2007 presumably would be moot.[1]

Equilon and Shell Trading on February 16, 2006, asked the ALJ to issue a declaration confirming the 2005 arbitration award and requiring Chevron to arbitrate the pricing issues raised in its complaint. By ruling dated April 3, 2006, the ALJ denied the motion, observing that an order to compel arbitration among parties that are not public utilities is a matter for the civil courts rather than this Commission.

4. Motion to Dismiss

Equilon and Shell Trading move to dismiss essentially on three grounds. First, they maintain that the doctrine of *res judicata* bars Chevron from maintaining the complaint because it was a party in an earlier adjudication before the California Court of Appeal in which the same 20" Pipeline was deemed not to be a public utility. Second, defendants argue that the complaint is barred by the doctrine of judicial estoppel, which prevents a party (in this case Chevron) from taking one position in the earlier litigation and then, for economic reasons, taking a contrary position on the same issue in a later proceeding. Finally, Equilon and Shell Trading argue that this Commission since 1917 has declined to exercise jurisdiction over oil pipelines operating through buy/sell agreements and that a Commission investigation of pipelines between 1975 and 1979 was concluded without a change in the Commission's practice.

We turn now to consideration of each of these arguments.

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[1] *Miller v. Railroad Commission* (1937) 9 Cal.2d 190 (once Commission assumes jurisdiction over a public utility, Commission may set aside any prior order or determination of courts in matters coming under the exclusive jurisdiction of the Commission.)

5. Prior Court of Appeal Decision

In 1986, the California Attorney General, the City of Long Beach and the State of California (collectively, the State) filed suit against various oil companies, including Chevron (the State Action).[2] In the State Action, the State asserted that Texaco Inc. (later acquired by Chevron) – then the owner of the 20" Pipeline – was operating the pipeline as a common carrier based on the same allegations now being made by Chevron in its complaint before this Commission.[3] The gravamen of the complaint was that buy/sell agreements were "sham" transactions used for the sole purpose of evading Commission regulation. The complaint further alleged that, by providing transportation services through the use of buy/sell agreements, Texaco had dedicated the 20" Pipeline to public use.

In 1991, most of the parties to the State Action settled, with five defendant oil companies agreeing to dedicate their crude oil pipelines in California as common carriers subject to Commission regulation. However, the settlement did not include the 20" Pipeline or two other heated crude oil pipelines. The parties disputed whether the three pipelines were private property exempt from Commission regulation or common carriers and public utilities dedicated to

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[2] *The People of the State of California, the City of Long Beach, as Trustee for the State of California, and the State of California, as Beneficiary v. Chevron Corporation, et al., Los Angeles Superior Court Case No. C587912, Consolidated with Case No. C661310* (the State Action).

[3] In October 2001, Chevron Corp. acquired Texaco Inc. as a wholly owned subsidiary and changed its name to ChevronTexaco Corporation. In February 2002, ChevronTexaco Corporation sold its interest in Equilon to Shell Oil Company. In May 2005, ChevronTexaco Corporation changed its name to Chevron Corporation. Complainant Chevron Products Company is a division of Chevron U.S.A. Inc. Chevron U.S.A. Inc. is a major subsidiary of Chevron Corporation.

public use and subject to such regulation. The parties agreed to litigate the status of the three pipelines in Superior Court.

In the State Action, plaintiffs sought a judicial declaration finding that the 20" Pipeline was operated as a public utility. That relief rested primarily on the following allegation:

> Each defendant has continued regularly during the period after 1980 to transport crude oil through its pipelines for others for compensation. In these pipeline operations defendants have each entered into sham crude oil purchase and sale or exchange agreements designed to disguise the fact that the pipelines are actually transporting oil for others. Pursuant to these sham transactions, defendant pipeline owners purport to purchase and take title to the crude oil offered for shipment at the pipeline entry point, with an agreement that similar quantities of crude oil will be resold to the original seller at the desired point of delivery.[4]

Similarly here, Chevron alleges in its complaint:

> By purporting to provide transportation services on the Shell Pipeline pursuant to the Shell Trading Contracts, Defendants are attempting to create the impression that they are merely buying and selling crude oil rather than providing public utility pipeline transportation service on the Shell Pipeline. The buy-sell arrangement on the Shell Pipeline is a subterfuge, lacking economic substance, devised for the sole purpose of evading Commission jurisdiction.[5]

In Superior Court, the defendants (including Chevron) asserted that the buy/sell agreements were legitimate, arm's-length transactions that resulted in the oil company being the true owner of the crude oil in its pipelines. They

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[4] Long Beach Complaint, at 34.

[5] Chevron Complaint, at 10.

stated that the transfer of title under the buy/sell agreements had genuine legal and economic consequences, including the transfer of risk of loss, risk of property damage, and the risk that the purchaser of the crude oil might be unwilling to accept oil when it was tendered for delivery.[6] Moreover, the defendants (including Chevron) maintained that the fact that these transactions were intended to avoid regulation was irrelevant as under California law any entity is permitted to structure its business activities so as to avoid falling within the purview of a particular regulatory scheme.[7]

The California Court of Appeal decided in favor of Chevron, Mobil and Texaco. In its August 3, 1994 decision (Attachment 13 to the defendants' Request for Official Notice) (the Court of Appeal Decision), the Court held that "the oil companies' conduct here establishes these pipelines [including the 20" Pipeline] were private, not common carriers subject to PUC regulation."[8] The Court's conclusion was based on findings that (1) the pipeline companies always owned the crude oil in the pipelines and suffered any risk of loss, (2) crude oil purchases from other producers were made through legitimate arm's-length transactions, (3) the companies never offered to transport oil, but rather bought and sold based on their own needs and available pipeline capacity, and (4) the percentage of crude oil bought from other producers was very low. The Court analogized the transactions to that of a supermarket company:

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[6] Submission of Chevron, Mobil and Texaco Pursuant to Court Order of May 28, 1992, filed July 30, 1992, at 20-22) (Joint Submission).

[7] Joint Submission at 18, citing *Thayer v. California Development Co.* (1912) 164 Cal. 117 and *People v. Duntly* (1932) 217 Cal. 150.

[8] Court of Appeal Decision, at 11.

> [I]f a large supermarket company produced some agricultural products on its own farms, and shipped them to market in its private trucks, but occasionally bought other produce from independent producers to fill its trucks when its own harvest could not, whether bought with cash or a promise to give produce to the other company at a later time, the supermarket's trucks would not thereby become common carriers, whether the trucks delivered the produce only to the supermarket's stores or delivered it to others for resale.[9]

Citing *Richfield Oil Corp. v. Public Util. Com.* (1960) 54 Cal.2d 419 and *Associated etc. Co. v. Railroad Commission* (1917) 176 Cal. 518, the Court noted that the California Supreme Court held that similar transactions did not render the pipelines common carriers.[10]

The Court of Appeal Decision is not certified for publication, and under Rule 977 of the California Rules of Court, "[e]xcept as provided in (b), an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action." However, under Rule 977(b), "[a]n unpublished opinion may be cited or relied on…when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel…" The Commission thus may rely on the decision in considering defendants' motion to dismiss based in part on the doctrine of *res judicata.*[11]

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[9] *Id.,* at 12

[10] *Id.*, at 13.

[11] The doctrine of *res judicata*, or "a matter adjudged," holds that a final judgment on the merits by a court of competent jurisdiction is conclusive of rights of parties or their privies in all later suits on points and matters determined in the former suit. (Black's Law Dictionary, Rev. 4th ed., at 1470.)

6. Judicial Estoppel

Equilon and Shell Trading argue that Chevron should not be permitted to successfully take one position regarding buy/sell agreements in the State Action and then, seeking lower prices than those available through the buy/sell agreements, take an opposite position in this case. Defendants cite the doctrine of judicial estoppel, also known as the doctrine of preclusion of inconsistent positions, which prevents a party from "asserting a position in a legal proceeding that is contrary to a position previously taken in the same or earlier proceeding."[12] According to defendants, California public policy does not permit litigants "to play fast and loose with the court" by taking self-contradictory positions.[13]

Judicial estoppel is applicable when (1) the same party has taken two positions (2) in judicial or quasi-judicial administrative proceedings, (3) the party successfully asserted the first position, (4) the two positions are inconsistent, and (5) the first position was not taken as a result of ignorance, fraud or mistake.[14]

Defendants argue that between 1985 and 1994, Texaco and Chevron in the State Action contended that transporting crude oil acquired using buy/sell agreements does not qualify as providing transportation services for others and that Texaco's use of such agreements could not have resulted in the 20" Pipeline

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[12] *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181 (citations omitted).

[13] *Schulze v. Schulze* (1953) 121 Cal.App.2d 75, 83; *In re Marriage of Toth* (1974) 38 Cal.App.3d 205, 212 (litigant may not "blow hot and cold" by taking the benefits of a doctrine "when it suits his purpose" and then repudiating the same facts "when it is no longer profitable or to his advantage to do so.")

[14] *Jackson v. County of Los Angeles, supra, at 183.*

being dedicated to the public use. Later, Chevron acquired an interest in the 20" Pipeline, sold it to Equilon and ultimately sold its interest in Equilon to Shell Oil Company. According to defendants, Chevron now "seeks to obtain an unfair economic advantage by reversing the positions from which it benefited in the State Action." (Motion to Dismiss, at 22.)

7. Commission Practice

Associated Pipe Line Co. v. Railroad Commission (1917) 176 Cal. 518 represented the Commission's first and last attempt to require all crude oil pipeline owners in the state to operate their pipelines as public utilities. Acting pursuant to state statute, the Railroad Commission ordered pipeline owners to file for Commission review their schedules of rates for the transportation of oil products. The pipeline owners appealed. The California Supreme Court ruled that pipeline owners that transport their own crude oil or purchase crude oil from third parties and transport only that oil to which the pipeline owner had acquired title do not thereby transport crude oil for others. The Court went on to state that neither the Legislature nor the Commission could, by fiat, require that private crude oil pipelines be made public utilities available for public use without condemning the property and providing just compensation to the owners. It held that any such action would constitute a violation of state and federal constitutional prohibitions on the taking of private property without compensation.[15] The United States Supreme Court affirmed the state court decision on June 5, 1920.[16]

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[15] *Associated Pipeline*, 176 Cal. at 529.

[16] 251 U.S. 228.

Since *Associated Pipeline,* the Commission has never required public utility status for a crude oil pipeline that was used by its owner to transport crude oil purchased from third parties. The only crude oil pipelines that the Commission currently regulates are those that either voluntarily submitted to Commission regulation or expressly held themselves out as being willing to serve any customer requesting service.[17]

In *City of Long Beach v. Unocal California Pipeline Company,* D.96-04-061, the Commission commented:

> Actually, this Commission has had little to do in the past with crude oil pipelines, both because FERC [the Federal Energy Regulatory Commission] regulation controls where interstate operation is involved and because state pipelines were operated privately by major oil companies. In the Four Corners cases cited by Long Beach, it can be seen that intrastate rates essentially have followed FERC rates, which in turn are calculated on a form of cost-of-service ratemaking. (1994 Cal. PUC LEXIS 380, at 21-22; footnotes omitted.)

Indeed, in *Re Investigation Into Possible Over-Assessment by State Board of Equalization*, D.93-07-047, the Commission dismissed oil pipelines and other utilities (cellular, nondominant interexchange carriers, radiotelephone utilities) from the proceeding on the basis that they "are not subject to cost-of-service [or] rate base rate-of-return." (D.93-07-047, at 6.)

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[17] *See, e.g., In re Southern California Edison Company*, Decision (D.) 94-10-044 (utility proposal contemplated entering into contracts with all customers that could potentially use its pipeline system and did not seek to deny service to others); *City of Long Beach v. Unocal California Pipeline Company*, D.94-05-022 (referencing settlement agreement in which Union Oil, Shell Oil, Chevron, Texaco and Mobil agreed to dedicate proprietary pipelines to public utility service); *Application of San Pablo Bay Pipeline Company,* D.05-07-016 (approving voluntary request of pipeline owner to be regulated as a common carrier.

Finally, the Commission after a lengthy investigation declined to take action with respect to oil pipelines like the 20" Pipeline at issue here. Between 1975 and 1979, the Commission investigated the business practices of crude oil pipeline companies to determine the extent to which they should be regulated.[18] The investigation resulted in the production by pipeline owners of thousands of documents and the execution of a settlement agreement regarding Atlantic Richfield Company, one of the pipeline owners. After four years, the investigation was concluded without a finding that the public interest requires the Commission to regulate pipeline owners as a result of their use of buy/sell agreements. (D.91074 (1979) Order Discontinuing Proceedings.)

8. Discussion

The parties here have submitted voluminous pleadings in support of their positions, providing for official notice dozens of decisions, rulings, transcripts and briefs from their earlier participation in arbitration and the State Action. The ALJ ruled that official notice would be accorded these documents. In essence, however, we are dealing with a dispute in which defendants have set buy/sell prices pursuant to contract higher than what complainant believes it should pay. This Commission rarely addresses contract disputes between parties, even when the parties are utilities, deferring instead to the civil courts on such matters.[19]

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[18] *See* D.88640 (1978) *Investigation on the Commission's Own Motion into the rates, rules, charges, operations, business practices, corporation, individual, partnership, joint venture or other entity which operates any pipeline for the transportation of crude or refined petroleum products within the State of California,* Case No. 9893.

[19] The Commission has stated, "Since the Commission has no jurisdiction to award damages, complaints alleging breach of contract are better served through the civil courts." (*Crystal River Oil and Gas v. Pacific Gas Electric Co.,* D.00-10-005, citing *Penaloza v. P.T. & T.*, 64 CPUC 496, 497.)

Nevertheless, while economics may drive this case, the complaint alleges a legitimate jurisdictional question, and we are obligated to consider whether we should assert jurisdiction over oil pipeline companies that transport oil through buy/sell agreements in which they acquire title to all of the oil products passing through the line.

Under the Public Utilities Code, a "pipeline corporation" includes every corporation "owning, controlling, operating, or managing any pipeline for compensation within this state." (Pub. Util. Code § 228.) "Common carrier" includes "every person and corporation providing transportation for compensation to or for the public or any portion thereof, except as otherwise provided in this part." (§ 211.) "Public utility" includes every common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, and heat corporation, where the service is performed for, or the commodity is delivered to, the public or any portion thereof." (§ 216.)

Section 216(b) of the Public Utilities Code provides:

> Whenever any common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, or heat corporation performs a service for, or delivers a commodity to, the public or any portion thereof for which any compensation or payment whatsoever is received, the common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, or heat corporation, is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part.

For an oil company to be a public utility and common carrier subject to Commission regulation, in addition to the statutory requirements that it transport oil for others for compensation, the company must have dedicated its property to public use. Dedication requires that the pipeline owner, either expressly or impliedly, unequivocally offer transportation service on equal terms to all members of the public who might be able to use it.[20]

The fundamental claim raised in the complaint is that the 20" Pipeline is being operated as a public utility. In order to prove this claim, the complainant must demonstrate (1) that the buy/sell agreements are a subterfuge used merely to avoid Commission regulation, and (2) that Equilon and Shell Trading have, through the use of these agreements, either expressly or impliedly dedicated the 20" Pipeline to public use. As demonstrated above, Equilon and Shell Trading have not expressly dedicated the pipeline to public use. Whether the pipeline has impliedly been dedicated to public use turns on the issue of whether buy/sell agreements are a subterfuge to mask the transportation of oil products for compensation. We find that this issue has been resolved by the Court of Appeal Decision in the State Action.

Chevron argues that the facts of the Court of Appeal Decision are not the same as those here and that neither Chevron nor intervenor Tesoro are in privity to the parties in the State Action. But neither Chevron nor intervenor Tesoro allege that the 20" Pipeline is operated differently today than it was at the time of the Court of Appeal Decision in 1994; that is, the pipeline is used to transport only the owners' oil products and oil products that the owners have purchased

[20] *Richfield Oil Corp. v. Public Util. Com.* (1960) 54 Cal.2d 419, 426-433; *Associated etc. Co. v. Railroad Commission* (1917) 176 Cal. 518, 520-530.

from third parties through buy/sell agreements. Moreover, Chevron and Tesoro acknowledge that the pipeline is not available to all who might seek to use it, although Chevron contends that the pipeline would be available to any producer in the San Joaquin Valley "if there were capacity available to serve such

customer." (Complaint, at 10.) Chevron and Tesoro admit that Equilon and Shell Trading have refused to enter into buy/sell agreements with some producers,[21] and they acknowledge that Equilon and Shell Trading do not make service available to all potential customers on equal terms.[22] By contrast, Commission-regulated pipelines must offer to ship oil for all wanting to do so, and if capacity is inadequate to meet all the demand, must offer all a proportionate share of available pipeline space.[23]

Chevron claims that based on *People v. Ocean Shore Railroad, Inc.* (1942) 32 Cal.2d 406, the passage of time alone since the Court of Appeal Decision precludes *res judicata* dismissal. *Ocean Shore* dealt with the question of whether there was evidence of intent to abandon a railroad right of way. In the first of two decisions, the court held that there was no evidence of intent to abandon the right of way two years after discontinuance of railroad service. In a second proceeding, after the lapse of 14 years with no resumption of service, the court concluded that the requisite intent to abandon the property was present.[24] By contrast, however, in the Court of Appeal Decision, the Court held that the defendants' use of buy/sell agreements did not amount to transporting crude oil for third parties. Time was not a factor in making this decision, and the passage

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[21] Chevron's Response to First Data Request, at 9, Request for Admission No. 18; Tesoro Response at 5.

[22] Chevron Complaint, at 12; Tesoro Response, at 6.

[23] Court of Appeal Decision, at 6.

[24] *Ocean Shore* (1927, 87 Cal. App. 188).

of time affords no basis to change the Court's conclusion.[25]

As to privity, the State Action specifically named Chevron as a defendant and declared that all references to Chevron included references to "the parent company and any of its owned or controlled subsidiaries."[26] While Tesoro was not a party to the State Action, its claims in this case were represented in the State Action by the City of Long Beach and the Attorney General, acting on behalf of the public. Under *Citizens for Open Access to Sand & Tide, Inc. v. Seadrift Association* (1998) 60 Cal.App.4th 1053, cert. denied, 1998 Cal. LEXIS 1960, a governmental agency or the Attorney General, exercising a right on behalf of the public, can usurp the right of members of the public to assert the same claim.[27]

Chevron claims that the Commission's policy on dedication of pipelines underwent a change with the Commission's decision in *PG&E v. Dow Chemical Corp.* (1994) 55 CPUC2d 430. In that case, Dow Chemical and a subsidiary used a gas pipeline to deliver gas to industrial customers through a combination of leases and exchange agreements. Under the leases, the "lessees" purportedly took a possessory interest in a portion of the pipeline, purportedly transporting

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[25] *See City of New Orleans v. Citizens' Bank of Louisiana* (1897) 167 U.S. 371, 398 (set of facts occurring in two different time periods "does not prevent the operation the thing adjudged, if, in the prior cases the question…was necessarily presented and determined upon identically the same facts upon which the right…is now claimed.")

[26] Long Beach Complaint, at 4, 6.

[27] *Sand & Tide*, at 1069. *See also, City of Martinez v. Texaco Trading & Transportation* (9th Cir. 2003) 353 F.3d 758, 764, in which the City of Martinez brought an action based on the same claims asserted by the Department of Fish and Game (DFG) in an earlier proceeding. The court held that the City of Martinez was in privity with DFG because the DFG was "clearly authorized to resolve the dispute involving the oil spill on behalf of the public."

their own natural gas for themselves. Under the "exchange" agreements, customers delivered gas to the gas field end of the pipeline and in exchange received gas delivered at the other end of the pipeline adjacent to their own facilities. The agreements specifically disclaimed dedication of the pipeline. Based on these facts, the Commission found irrelevant Dow Chemical's contractual provision disclaiming dedication, instead looking to Dow's conduct as determinative. The Commission concluded that Dow Chemical's conduct "unequivocally shows a dedication of excess capacity for the life of the pipeline." (*Dow Chemical,* 55 CPUC2d at 444.)

However, *PG&E v. Dow Chemical* is distinguishable from the complaint case before us. In the natural gas industry, gas corporations such as PG&E are given a franchise area, an obligation to serve that franchise area, and the right to earn a reasonable rate of return based on serving customers in that area. Because of this, PG&E sought, and the Commission granted, a cease and desist order to stop Dow Chemical from competing with PG&E and placed a restriction on Dow Chemical's use of its pipeline. No such franchise area is at issue in the case before us, nor was a remedy sought by which Dow Chemical would be required to make its natural gas pipeline available to others. Moreover, in *PG&E v. Dow Chemical,* there was no indication that the Commission had previously permitted the use of exchange agreements in the natural gas industry. Dow Chemical had attempted to employ such agreements for what appeared to be the first time, and the Commission found that in the natural gas industry, such contracts are not appropriate. By contrast, the Commission has long recognized the use of

buy/sell agreements in the crude oil industry. The restriction imposed in a gas pipeline case is not applicable in a case involving a crude oil pipeline.[28]

Accordingly, we find that the complaint before us is barred by the doctrines of *res judicata* and judicial estoppel, in that the fundamental issue – the use of buy/sell agreements for the 20" Pipeline – has been decided by the Court of Appeal Decision in 1994. To the extent that the complaint seeks to challenge the Commission's practice with respect to proprietary oil pipelines, the case is improvidently brought as a complaint case involving a single heated oil pipeline instead of as a petition for rulemaking under Pub. Util. Code § 1708.5 to change the Commission's regulation of oil pipelines. Section 1708.5, effective January 1, 2000, requires that "[t]he commission shall permit interested persons to petition the commission to adopt, amend, or repeal a regulation….The commission shall consider a petition and, within six months from the date of receipt of the petition, either deny the petition or institute a proceeding to adopt, amend, or repeal the regulation."

9. Chevron's Motion for Summary Adjudication

Three weeks after defendants filed their motion to dismiss, Chevron filed its motion for summary adjudication, alleging primarily that the frequent use of the word "transportation" in Equilon and Shell Trading documents is proof that defendants use buy/sell agreements to provide public utility transportation services. Defendants respond that, as found by the Court of Appeal Decision,

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[28] *See Application of Western Gas Resources-California, Inc.,* D.99-11-023, 1999 Cal. PUC LEXIS 856 at 24 (If for no other reason, electricity and gas have different physical characteristics that may give rise to different treatment. Therefore, what we have and have not said with regard to electric industry deregulation cannot willy nilly be applied to the gas industry.")

each buy/sell agreement provides that title to and risk of loss for the crude oil transfers from the seller to Shell Trading in the San Joaquin Valley and title to different but comparable crude transfers from Shell Trading to the original seller at a receipt point in the Bay Area. Based on this, defendants argue that use of the word "transportation" is a term of art in the industry that, when used in the context of buy/sell agreements, means "to exchange crude oil at different locations."

Chevron concedes that public utility dedication of a pipeline cannot be presumed without evidence of unequivocal intention. As Chevron and other pipeline owners argued in the State Actions, that intention is absent when the pipeline owner (1) has denied access to certain customers, (2) has only provided access to customers where the parties were able to agree on terms and conditions of service, including price, or (3) where the public is on notice that access is only available to the extent capacity is not required by the pipeline owners. In this case, Chevron admits that Equilon and Shell Trading have declined to enter into buy/sell agreements; Chevron acknowledges that Equilon and Shell Trading do not provide buy/sell arrangements absent mutual agreement on terms and conditions, and Chevron agrees that only surplus capacity is available for use in buy/sell arrangements.

For these reasons, and for the reasons articulated in our discussion of the motion to dismiss, Chevron's motion for summary adjudication is denied. The corresponding motion for summary adjudication filed by Equilon and Shell Trading is dismissed as moot in light of our decision to grant the motion to dismiss.

10. Category and Need for Hearing

On December 15, 2005, in the Instructions to Answer notice in this case, this proceeding was deemed adjudicatory, and a hearing was deemed necessary. As explained above, a hearing became unnecessary based upon our decision to grant defendants' motion to dismiss.

11. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on _____ and reply comments were filed on _____.

12. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Glen Walker is the assigned ALJ in this proceeding.

Findings of Fact

1. The 20" Pipeline that is the subject of this complaint is owned by Equilon and Shell Trading.

2. The 20" Pipeline is a 265-mile-long heated oil pipeline running from the San Joaquin Valley to the Bay Area.

3. Defendants use the pipeline to transport their own oil and, when capacity permits, oil purchased from other producers through buy/sell agreements.

4. A buy/sell agreement is a contract in which a pipeline owner buys crude oil from a supplier at one end of the pipeline and sells an equivalent amount of oil to the supplier at the other end of the pipeline.

5. Chevron has used the 20" Pipeline for approximately 10 years through buy/sell agreements pursuant to a Proprietary Pipeline Contract.

6. Chevron in 2005 disputed the prices of certain buy/sell agreements with defendants and, pursuant to the Proprietary Pipeline Contract, submitted the dispute to arbitration.

7. An arbitration decision that issued on June 20, 2005, established the price per barrel under the buy/sell agreements through December 31, 2005.

8. In December 2005, Chevron and Shell Trading entered into a new buy/sell agreement establishing pricing for transactions between January 1, 2006 and June 30, 2007.

9. In December 2005, Chevron filed this complaint, alleging that the 20" Pipeline is a public utility and that the Commission has exclusive jurisdiction to determine pricing for the pipeline.

10. Equilon and Shell Trading have moved to dismiss the complaint based on the doctrines of *res judicata* and judicial estoppel, as well as what they contend is the Commission's policy on buy/sell agreements at oil pipelines.

11. The California Court of Appeal in 1994 held that buy/sell agreements involving the 20" Pipeline are valid contractual agreements and that, therefore, the 20" Pipeline is not a public utility subject to Commission regulation.

12. The California Supreme Court in 1917 ruled that a pipeline owner that transports only that oil to which the pipeline owner had acquired title does not thereby transport crude oil for others.

13. The only crude oil pipelines that the Commission currently regulates are those that either voluntarily submitted to Commission regulation or expressly held themselves out as being willing to serve any customer requesting service.

Conclusions of Law

1. An oil pipeline corporation that transports oil for others for compensation is a public utility subject to the jurisdiction of the Commission.

2. For an oil company to be a public utility and common carrier subject to Commission regulation, in addition to the statutory requirement that it transport oil for others for compensation, the company must have dedicated its property to public use.

3. The Court of Appeal in 1994 found that the use of buy/sell agreements on the oil pipeline at issue in this case did not constitute transportation of oil for others.

4. Complainant here bears the burden of proving that the buy/sell agreements are a subterfuge used merely to avoid Commission regulation, and that Equilon and Shell Trading have, through the use of these agreements, either expressly or impliedly dedicated the 20" Pipeline to public use.

5. The Commission finds that Chevron's complaint is barred by the doctrines of *res judicata* and judicial estoppel. Similarly, under the derivative doctrine of *Citizens for Open Access to Sand & Ampers and Tide,* we find that *res judicata* and judicial estoppel apply to Tosoro's claim.

6. To the extent that the complaint challenges the Commission's practice with respect to proprietary oil pipelines, the case should have been brought as a petition for rulemaking under Pub. Util. Code § 1708.5.

7. The complaint should be dismissed, and this proceeding should be closed, effective immediately.

O R D E R

IT IS ORDERED that:

1. The motion by Equilon Enterprises LLC, doing business as Shell Oil Products US, and Shell Trading (US) Company to dismiss this complaint is granted.

2. The motion of Chevron Products Company for summary adjudication is denied.

3. No hearing is necessary in this proceeding.
4. Case 05-12-004 is closed.

This order is effective today.

Dated _____, at San Francisco, California.

INFORMATION REGARDING SERVICE

I have provided notification of filing to the electronic mail addresses on the attached service list.

Upon confirmation of this document's acceptance for filing, I will cause a Notice of Availability of the filed document to be served upon the service list to this proceeding by U.S. mail. The service list I will use to serve the Notice of Availability of the filed document is current as of today's date.

Dated June 13, 2006, at San Francisco, California.

/s/ ANTONINA V. SWANSEN
Antonina V. Swansen

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